79-1057

No.

Supreme Court, U. S.
FILED
JAN 5 1980
MICHAEL RODAK, JR., CLERK

In the

Supreme Court of the United States

OCTOBER TERM, 1979

EVEREADY INCORPORATED, a corporation and MARK GILBERT, an individual,

Petitioners,

vs.

UNION CARBIDE CORPORATION, A Corporation,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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January 6, 1980

The Scheffer Press, Inc.—(312) 263-6850

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners, Ever-Ready Incorporated and Mark Gilbert, respectively pray that a writ of certiorari issue to review the Order of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on June 13, 1979, (Unpublished Order—Not To Be Cited), and affirmed by the denial of a petition for en banc rehearing on August 9, 1979, six of eight active judges abstaining.

OPINIONS BELOW

The Order of the Court of Appeals for the Seventh Circuit entered June 13, 1979 is unpublished and unreported. The Opinion of the District Court on remand, for the Northern District of Illinois, Eastern Division, entered March 3, 1977, is unpublished and unreported. These opinions derived directly from the Opinion of the Court of Appeals for the Seventh Circuit entered January 30, 1976, as amended March 11, 1976. The Opinion of the Seventh Circuit entered January 30, 1976, as amended March 11, 1976 is reported at 531 F.2d 366. The original trial court Opinion of the District Court for the Northern District of Illinois, Eastern Division, entered February 18, 1975, is reported at 392 F. Supp. 280. The unpublished orders of the Seventh Circuit and the Remand Court and the published opinions of the Seventh Circuit in 1976 and the prior Opinion of the District Court are appended hereto.

JURISDICTION

The Order of the Court of Appeals for the Seventh Circuit was entered June 13, 1979 as "Unpublished Order —Not To Be Cited."

Petition for en banc rehearing, timely filed June 27, 1979, was denied August 9, 1979.

On petitioners' application for extension of time for filing a petition for writ of certiorari in the above entitled cause, time was extended to January 6, 1980 by this Court, assigning to it No. A-335 on October 22, 1979.

This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals for the Seventh Circuit had jurisdiction over the question of laches, when that question was unappealed, unargued and had been reserved by the District Court; all appealed questions having been decided without need to decide laches.

2. Whether the Court of Appeals deprived petitioners of due process of law or other essential elements of justice, when it decided the unappealed and reserved question of laches without prior notice to the parties and without first hearing arguments on that question especially when; the facts relative to laches had not been stated by either party or by the District Court; the Court of Appeals deciding the question on its own statement of facts which neither party had seen and which was clearly erroneous.

3. Whether the injunction as modified by the Court of Appeals was excessive, particularly in not allowing a period for orderly transition even though petitioners had not been charged with bad faith and had won a complete victory in the District Court; and also in prohibiting use of Ever-Ready on desk lamps and on bulbs for desk lamps, considering their long standing useage and that they were outside of the Union Carbide complaint as well as outside of Carbide's U.S. Patent Office Trademark Registration Certificates.

4. Whether the practice of the Seventh Circuit Court of Appeals as indicated by the foregoing must be declared improper as protection to all litigants similarly situated and as a matter of public importance.

CONSTITUTIONAL CLAUSES INVOLVED

FIFTH AMENDMENT. "• • • nor shall any person • • • be deprived of life, liberty, or property, without due process of law"

FOURTEENTH AMENDMENT, Section 1. "• • • No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

ARTICLE IV, SECTION 2. "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

ARTICLE VI, Paragraphs 2 and 3. "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof • • • shall be the supreme Law of the Land. • • • all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution • • •."

STATEMENT OF THE CASE

Petitioner, Mark Gilbert, is the owner of a desk lamp and desk lamp accessory business formerly known as Ever-Ready, Inc. Gilbert began his business in 1944 and used the term Ever-Ready in his company name and on his products from 1944 until 1977, when, by the terms of the injunction issued on remand by the District Court, he was ordered to immediately terminate, allowing no time for transition, the use of Ever-Ready in his company name and to immediately cease the sale of his inventory of products bearing that term.

Prior to this litigation, petitioners' small business was fairly successful. Mark Gilbert, the Ever-Ready principal, began his business in 1944 as Ever-Ready Fluorescent Service and continues to conduct a fluorescent maintenance service under that name. That business expanded to include the sale of fluorescent tubes and desk lamps labeled "Ever-Ready" and in 1946 a new company called Ever-Ready Electric Co. was formed to separate such products from the business of contract lighting maintenance and to further a developing national desk lamp business. The business was incorporated as Ever-Ready Electrical Supply Company in 1952, its name changed to Ever-Ready Incoporated (1955) and Ever-Ready International, Ltd. (1972).

In 1950, on submitted application, Union Carbide appointed petitioners' Ever-Ready as a franchised distributor of its EVEREADY batteries and flashlights. Carbide conditioned that appointment on Ever-Ready's giving up their sales of Bright Star batteries and flashlights but did not require petitioners to abandon their Ever-Ready mark. Carbide renewed the franchise for 1951 and 1952. (Rec. DX118, App. 233, 234, 277-279).

The evidence adduced at trial showed conclusively that petitioners continuously used the mark Ever-Ready in their company names and on their products starting with 1944 to 1971 when Carbide filed its action. (Record, Appendix pp. 218, 236, 237, 243, DX131; 219; pp. 11, 58, 59 of Catalog 156-A, (Exh.DX1); pp. 162, 163, 169 of Catalog 155-B, (Exh.DX-2) 221; Exh. PX49, pp. 271, 273, 287; DX55, 226; DX31, pp. 162, 231, 232, 260; pp. 226, 270; Gilbert depos. 2/23/72, Exh. Forms 9003-ADV., 9005-ADV., pp. 43, 45 Sep. Cert. 6/20/77).

Among 300 users of some variant of the mark ever ready, on electrical products other than those of petitioners and respondent, were American Safety Razor Corp., Ever-Ready electric shavers, date of first use 1904; Sears-Roebuck & Co., Eveready electric power drives, date of first use 1949; Eveready Flood Control, Inc., Eveready electric compressors, date of first use of mark, 1957; Eveready Burner Supply Co., Eveready electric heaters and G.T.E. Sylvania, Ever-Ready electrical wiring devices. (Short Rec. 4/1/77. Also see TCR certified computerized printout, Appellants' main brief at A36-A65).

In July 1971, Carbide first contacted petitioners, stating that sale of their high intensity light bulbs for home use under the trademark "Ever-Ready" constituted infringement of Carbide's "EVEREADY" mark used on packaging of General Electric miniature lamp bulbs which Carbide sold until General Electric terminated their agency agreement in 1974, following a 1973 federal court decision that General Electric lamp bulb Agency agreements were in restraint of trade and violative of antitrust law. (DX142, DX143 Sep.Cert. 6/30/77).

Following petitioners' refusal to abandon their mark used for more than 25 years, on December 30, 1971, respondent filed suit for trademark infringement and unfair competition, with a pendent dilution claim under the Illinois Trade-Mark Act, Ill. Rev. Stat., Ch. 140, § 22. Jurisdiction of the District Court was founded upon 15 U.S.C. § 1121, 28 U.S.C. §§ 1332 and 1338. The complaint asked that defendants be perpetually enjoined from using their mark "EVEREADY" in any connection with the "advertising, offering for sale or sale of any products such as electric flashlights and accessories, lanterns, batteries, and miniature lamp bulbs for flashlights and accessories, lanterns, lamps, toys, novelties, and automotive, aircraft, marine and related uses or services connected therewith" (Rec. App. 8-9, Sec. 1(a), (b), (c), (d)).

The complaint made no mention of lamps as receptacles for light bulbs. The complaint made no mention of high-intensity light bulbs. The complaint was supported by five Exhibits To The Complaint, which purported to be copies of U.S. Patent Office Trademark Registration Certificates. The purported copies were uncertified by the U.S. Patent Office. They purported to be copies of: U.S. Patent Office Trademark Registration Certificate No. 135,757 (Class 21) "for electric batteries, dry cells and storage batteries"; Certificate No. 268,557 (Class 21) "for electric batteries"; Certificate No. 796,721 (Class 26) "for electric equipment and controls for testing batteries"; Certificate No. 707,745 "EVEREADY and design"; and Certificate No. 815,394 "EVEREADY ENERGIZER and design". (See Complaint Exh. 2A, 2B, 2C, 2D, 2E).

None of the purported Trademark Registration Certificate copies dealt with lamps as receptacles for light bulbs or with light bulbs. At the time of the filing of its complaint, Carbide did not sell high-intensity light bulbs. Carbide first applied for a U.S. Patent Office Trademark Registration Certificate for "MINIATURE AND LARGE ELECTRIC LAMP BULBS FOR GENERAL SERVICE AND INDUSTRIAL USES" on February 10, 1975, some 37 months after the filing of its law suit and eight days before a District Court Opinion adverse to Carbide was to come down. (Certif. Serial No. 43,922, See main brief A-57).

While Carbide's law suit did not seek damages or an accounting of Ever-Ready's profits, it did seek that Ever-

Ready be required to deliver up to it all material and merchandise bearing the allegedly infringing term Ever-Ready. (See prayer of complaint).

Petitioners denied the substantive allegations of the complaint, and raised as affirmative defenses, laches and misuse of Carbide's trademark in violation of antitrust laws. At trial, this latter defense was severed for separate trial pursuant to Federal Rule of Civil Procedure 42(b). (A. 41)

Upon a bench trial, Judge Prentice H. Marshall found no infringement, no unfair competition and no dilution under Illinois law. Judge Marshall also decided that there was no likelihood of confusion, no actual confusion and collaterally ruled that plaintiff's use of its mark on batteries was descriptive and therefore invalid under the Lanham Act. This decision was rendered after the trial court had the opportunity to observe the demeanor of the witnesses and carefully weigh the evidence. Having disposed of the complaint, Judge Marshall did not reach the issue of whether laches barred Carbide from obtaining relief. (R. 73-95)

Carbide appealed to the Seventh Circuit Court of Appeals and obtained a reversal of Judge Marshall's decision in its entirety. Among other things, the Court held that Carbide's mark had become incontestible under 15 U.S.C. § 1065 and that Carbide had exclusive use of the trademark. As a result, the Court concluded that Carbide's mark was immune from any attack on its validity. To reach this conclusion, the Seventh Circuit reversed its position as stated in *John Morrell & Co.* v. *Reliable Packing Co.*, 295 F.2d 314 (1961). Moreover, Judge Pell recognized that the Court's new position was directly contrary to the decisions of the Ninth Circuit in *Tillamook*

County Creamery Association v. *Tillamook Cheese and Dairy Association*, 345 F.2d 158 (1965) cert. denied, 382 U.S. 903, and the Eighth Circuit in *Wrist-Rocket Manufacturing Co., Inc.* v. *Saunders Archery Co.*, 516 F.2d 845 (1975), cert. denied, ... U.S. ....., 96 S. Ct. 134, 46 L.Ed. 2d 100. (A. 32-51).

In reversing Judge Marshall, Judge Pell held, inter alia, that the trial court erred in respect to its conclusion of law that there had been no infringement, and further held that he erred with respect to his finding of fact that there was no likelihood of confusion. Judge Pell further held that the antitrust issues severed by Judge Marshall pursuant to Fed. R. Civ. P. 42(b) was not involved in the appeal and that the laches defense was not available to the defendants. (A. 52-66).

Following receipt of that Opinion, defendants-appellees filed a Petition For Rehearing asking for trial court adjudication of the affirmative defenses of misuse of Carbide's trademark in violation of antitrust laws and laches. Whereupon, the Seventh Circuit invited Carbide to respond to Part II of the petition dealing with the laches defense. Defendants-appellees were not permitted to reply to the response and no full briefing was scheduled.

Shortly after receiving Carbide's response to Part II of the Petition For Rehearing, the Seventh Circuit amended its Opinion, remanded the antitrust defense to trial (A. 70-71) and ruled that the laches defense was not available to defendants, (A. 72), declaring:

> "In 1969 defendants commenced importing miniature lamp bulbs having the term Ever-Ready stamped on their bases and selling these bulbs in blister packages containing the term Ever-Ready in a four-sided

logo and indicating that they are for high-intensity lamps." 531 F.2d 366 at 371 (1976) (A. 32).

"Prior to 1971, Ever-Ready did not market the products involved in this case under its own name. * * * In 1971, Ever-Ready began marketing the products involved in this case. Carbide filed its complaint on December 30, 1971. The time lapse is insufficient to establish laches on the facts of this case." 531 F.2d 366 at 388-389, (1976) (A. 66).

In any event, the issues of laches was not urged on this appeal and may be considered as having been waived." 532 F.2d 366 at 389, (1976) (A. 66).

Introduced in evidence at the District Court trial on October 13, 1976, before Judge George N. Leighton hearing the antitrust defense, were Exhibit DX142, plaintiff's notice of a meeting with General Electric called to discuss "alternate methods of selling lamps * * * made necessary by a court decision declaring 'agency' illegal" and Exhibit DX143, the minutes of that meeting confirming agency contracts as violative of antitrust law. Also available to the District Court were copies of the General Electric-Union Carbide agency agreement, some of which were held under seal. Judge Leighton, immediately upon conclusion of a three hour trial, held that there was no violation of antitrust law, basing his decision on a purported October 1, 1976 Stipulation of Uncontested Facts Relating to Antitrust Defenses Alleged by Defendants, which had been entered by defendants' then attorneys without defendants' knowledge or consent, which stipulations had been previously contested and which contradicted the very arguments presented before Judge Marshall at the original trial. (Appellant's main brief pp. 37-42).

Just days prior to the October 13, 1979 remand trial, Gilbert discovered that his attorneys had entered stipulations which had been previously contested and which contradicted their arguments in the original trial and that they were not planning to call as witnesses the participants at the General Electric-Union Carbide meeting called to discuss "alternate methods of selling lamps * * * made necessary by a court decision declaring 'agency' illegal". (DX142, DX143 See appellants' main brief). Facing his attorneys with the unauthorized and previously contested stipulations and their failure to call essential witnesses, he asked them to withdraw from the case and ask the court for some time in which to find replacement attorneys. They refused stating it was too late and that the judge would not so permit. (Main brief p. 41).

On January 5, 1977, Judge Leighton's findings of fact came down, the substance of which were the unauthorized and previously contested stipulations. Thereafter, on February 4, 1979, defendants' attorneys did withdraw and Gilbert proceeded as pro se.

On March 3, 1977, Judge Leighton entered an injunction, allowing no time for transition which stated:

"1. Defendant MARK GILBERT, individually, and the corporate defendant, EVER-READY INCORPORATED, by change of name, EVER-READY INTERNATIONAL LTD., its officers, directors, agents, servants, employees, attorneys, confederates and all persons acting for, with, by through or under them, and each of them, be and they thereby are perpetually enjoined and restrained: (A. 28)

"(a) From using the term EVER-READY * * * on or in connection with the advertising, offering for sale or sale of electric flashlights and accessories, lanterns, batteries, lamps, miniature lamp bulbs, lamp

bulbs or any other electrical products not sold by or under the authority of Union Carbide Corporation." (A. 28).

"(b) From using the term EVER-READY * * * as part of any corporate, partnership, firm or trade name, on or in connection with the advertising, offering for sale or sale of electrical products * * *". (A. 28).

On April 1, 1977, petitioners' motion for reconsideration was denied and on that day he filed an appeal and an emergency motion in the Seventh Circuit asking for a stay of the injunction during pendency of appeal. The Court of Appeals granted the motion but on objection of respondent, the Court dissolved the stay on April 14, 1977, without permitting petitioners to respond. (Main Br. p. 15).

Plaintiff moved to enforce the injunction on August 15, 1977 and the District Court compelled compliance on October 13 and 20, 1977.

On June 8, 1978, Mark Gilbert was formally given permission to withdraw sealed documents from the record. That night, for the first time in 32 years, Gilbert's office and warehouse were broken into. Only the office was burglarized, Gilbert losing three attache cases and a sample case containing documents in this cause. (Chicago Police Report Z-198694). On June 16, 1978, he again withdrew sealed documents. That night, he was hit by a second try, this time a break-in attempt that was foiled by changes in the burglar alarm system. (Chicago Police Report Z-209911). Under Circuit Rule 4(g), had record elements been stolen so that they could not be returned, Gilbert could not have filed his reply brief. (Reply Brief pp. 37-38).

Petitioner appeared for Oral Arguments on May 25, 1979 and the Court of Appeals for the Seventh Circuit by order entered June 13, 1979, found the injunction entered by Judge Leighton as overbroad and ordered a slight narrowing of the injunction. The Court held defendant's arguments on laches and misuse of mark in violation of antitrust law and deprivation of due process as "without merit". The Seventh Circuit failed to respond specifically to any of the 23 assignments of error, six of those assignments dealing with laches, as developed by defendants in their arguments. The Unpublished Order-Not To Be Cited offered no explanations of why petitioners' arguments were "without merit". (A. 24-26).

Petitioners on June 27, 1979, then sought a rehearing en banc but this was denied by "a majority of the judges on the original panel" on August 9, 1979. (A. 1).

REASONS WHY THE WRIT SHOULD BE GRANTED

The importance of correction of the holdings of the Court of Appeals for the Seventh Circuit transcends the issues of unfair competition and trademark infringement, the paramount questions being due process, equal treatment under law and the rule of law itself.

If any of these rights are violated, such violation impacts on every citizen in the land and the rule of law becomes a sham, a nullity where equality may be equated with the resources of litigants, wherein those of equal financial strength and influence are accepted as true equals before the bar of justice.

The public's concern with the quality of judicial administration of the rule of law is reflected in the statement of Senator Orrin G. Hatch made on the floor of the Senate on September 7, 1978, when in support of S.1423, The Judicial Tenure Act, he said:

> "In my legal practice, I have seen certain Federal judges controlled or influenced by large corporations. I have seen control of certain Federal Judges by large law firms and I have seen it on more than one occasion. I have also seen Federal judges who were controlled by special interests.
>
> "I have seen Federal judges become arbitrary, capricious, exhibit all kinds of partiality, and I have seen an abuse of the legislative processes by what has been referred to as 'Government by judiciary'"
>
> "I have seen judicial intemperateness and I have seen judges continually intervening in the trial of cases, even when there were competent trial lawyers trying

> the cases, because the judges took sides early in the trial instead of being impartial as judges should be."
> —Congressional Record at S 14766.

When courts are perceived by the public as particularly responsive to the persuasion of power and influence over law, the rule of law breaks down as is evidenced by the accelerating increase in crime and the increasingly diminishing respect by the citizenry for lawyers, their courts and government.

The basic notion of due process involves granting each litigant the opportunity to be heard, and to present the facts most favorable to their position before decision. Procedures which are contrived to deprive citizens of property without due process of law, if permitted to maintain, would violate our last line of defense against the tyrannies of a prejudiced court.

Petitioners' positions have found support in the interest of the public as is evidenced from the Rummler-Robertson Amici Curiae Brief (A. 96-111), the Robertson letter to the Seventh Circuit dated May 6, 1978 (A-112) and the Amicus Brief of the Committee For Equality of Citizens Before the Courts (A. 113-117). That the issues are of further public interest may be seen from articles published in the Chicago Daily Law Bulletin "EVEREADY error overcorrected; sad plight of 'Mr. Ever-Ready'" (A. 118), "Union Carbide does not deny lack of due process" (A. 119), "Turncoat confesses: Surveys of trademarks can be illusions" (A. 120) and other publications such as Office World News, now first presented. (A. 121).

Petitioners submit that should the writ issue in the instant cause, the Supreme Court could declare that sua

sponte appellate consideration of an issue unadjudicated in the trial court is off limits and violates the standards of review authority; that such issue or issues be remanded for hearing and judgment by the trial court; and that in any event, should an appellate court take on such heavy responsibility, that it permit full briefing and arguments on facts and law, before deciding such issue.

By granting the writ, the Supreme Court will come to grips with the universally accepted requirement that every litigant is entitled to trial court hearing, consideration and adjudication of lawful pleadings before the potential of appellate review can be brought to bear; that such procedural safeguards for all citizens are essential to fair and equal treatment under law and that the due process requirements guaranteed by the constitution would be best served by such definitive standards, without *which this problem and reoccurrences* are not likely to heal themselves.

• If the burdens of this Court prevent consideration of a full writ of certiorari, an easied writ of mandamus would be helpful. It could direct the Seventh Circuit to vacate its improper determination of laches. If the Court has any hesitancy to so direct, it could offer an alternative for the Court of Appeals to explain why it does not do so, beyond its statement that the issue is "without merit."

ARGUMENT

I.

JURISDICTION OVER A LITIGANT'S MAJOR AFFIRMATIVE DEFENSE RESIDES IN THE DISTRICT TRIAL COURT—ORIGINAL ADJUDICATION OF APPELLEE'S DEFENSE OF LACHES WAS NOT THE PROPER FUNCTION OF THE COURT OF APPEALS WHEN THAT QUESTION WAS UNAPPEALED, UNARGUED AND HAD BEEN RESERVED BY THE DISTRICT COURT; ALL APPEALED QUESTIONS HAVING BEEN DECIDED WITHOUT NEED TO DECIDE LACHES.

The function of an appellate tribunal is to *review* the judgments rendered by the trial court. It is not consistent with this function for an appellate court to assume jurisdiction over an issue and make determinations of facts which are the province of the trial court, particularly when that issue was not on appeal and therefore unargued, having been reserved by the District Court.

The trial court Opinion came down on February 18, 1975. In that Opinion, Judge Prentice H. Marshall treated all of the elements in the Union Carbide complaint, holding that there was no unfair competition, no dilution and no infringement; collaterally ruling that Carbide's use of EVEREADY on batteries was descriptive and therefore invalid under the Lanham Act; and reserving the affirmative defenses of Carbide's misuse of its trademark in violation of antitrust law and laches for separate trial. (A. 73-95). Of the laches defense, Judge Marshall said:

> "In light of my conclusion on the trademark infringement issue, I do not reach defendants' affirmative defense of laches." (Footnote 28) (A. 95).

From that statement, it may be readily seen that the District Court decision recognized the defense of laches but ruled that its decision for the defendants on other grounds made the laches defense unnecessary, and the District Court therefore reserved it.

Union Carbide appealed the issues reached in the trial court and the litigants did not argue the reserved issues of misuse in violation of antitrust law and laches. NO ASPECT OF THE APPEAL OR THE RESPONSE THERETO EXPRESSLY BROUGHT THE ISSUE OF LACHES BEFORE THE COURT OF APPEALS, AND THE BRIEFS DID NOT URGE THAT IT BE DECIDED.

Judge Marshall was reversed on each of his findings of fact and conclusions of law and following a petition for rehearing asking for trial court adjudication of the reserved issues of antitrust violation and laches, the Seventh Circuit remanded the antitrust issue but ruled that the defense of laches was not available to defendants-appellees. (A. 70-72).

The assumption of jurisdiction over the issue of laches and the role of the trier of fact by The Seventh Circuit deprived petitioners of their right to trial and denied their rights to due process as guaranteed by the Fifth and Fourteenth Amendments to the Constitution.

This Court has said:

> "The essence of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner'". *Armstrong* v. *Manz.* 380 U.S. 545, 552, 85 S.Ct. 1187, 1191, 14 L.Ed.2d 62 (1965).

By coming to its sua sponte decision on laches, without remanding that issue for trial, the Seventh Circuit

denied petitioners the opportunity to be heard "at a meaningful time and in a meaningful manner"—thus petitioners were denied due process.

In *Jerrell* v. *Kenai Peninsula Boro. Sch. Dist.,* a Court of Appeals stated:

> "• • • Nevertheless, under established appellate principles, our rule on review does not permit us to ignore the trial court's conclusion or its exercise of discretionary powers, absent an abuse of that discretion. For us to reweigh the facts and equities and then substitute our judgment where there is no abuse of discretion, would abrogate the distinction between the functions of an appellate court and a trial court." Alaska, 567 P.2d 760 at 767. S.Ct. of Alaska (1977).

In *Gaffney* v. *McCarron,* an appellate court added further substance to this principle as it stated:

> Where the outcome of a case is contingent upon the facts found in the record, a reviewing court will not disturb the findings and judgment of the trial court in nonjury cases should the record reveal any evidence to support those findings". (Citing Brown v. Zimmerman (1959), 18 Ill. 2d 94, 102, 163 N.E.2d 518.)
>
> "Furthermore, even when the evidence appears to be in direct conflict, a reviewing court will not substitute its judgment as to credibility of the witnesses for that of the trial court and will not disturb those findings unless they are clearly against the manifest weight of the evidence. (Citing Scheinge v. Village of Niles (1st Dist. 1968). 101, Ill. App.2d 406, 243 N.E. 2d 255.)
>
> "Our courts have declared manifest weight to mean 'the clearly evident, plain and indisputable weight of the evidence'." (Citing Gettemy v. Grgula (1st Dist. 1975), 25 Ill.App.3d 625, 628, 323 N.E.2d 628, 630.) *Gaffney* v. *McCarron,* 360 N.E.2d 508 at 509 (1st Dist. 1977.)

In *Bess* v. *Daniel,* 355 N.E.2d 566 at 599 (1976), an appellate court held that it did not have the authority to consider a matter not passed on by the trial court. It stated:

> "This court will not consider an issue which the trial court did not consider. It is well settled that we do not have the authority to consider a matter not passed on by the trial judge (Trisko v. Vignola Furniture Co., 12 Ill.App.3d 1030, 299 N.E.2d 421; Murphy v. Kumler, 344 Ill.App. 287, 100 N.E.2d 660), or which the trial judge refused to consider. (Board of Education of Chicago v. Chicago Teachers Union, 26 Ill. App.3d 806, 326 N.E.2d 158) It is apparent that the trial judge's final order adjudicated only the liability of plaintiffs and the County. Any additional issue are not properly before us. Edelman v. Lee Optical Co., Inc., 24 Ill.App.3d 216, 320 N.E.2d 517."

In assuming jurisdiction over the question of laches when that issue was unappealed, unargued and had been reserved by the District Court, the Seventh Circuit has abrogated the functional distinction between trial and appellate courts.

II.

WHEN THE SEVENTH CIRCUIT UNDERTOOK ITS CONSIDERATION AND DISPOSITION OF LACHES IT FAILED TO PROVIDE CONDITIONS AND CONTROLS TO ASSURE FAIR, IMPARTIAL AND EQUITABLE TREATMENT OF LITIGANTS.

A. It overlooked the fact that the Record and the Appendix reflecting that Record were not selected in consideration of the issue of laches as that issue had been reserved by the trial court. No aspect of the appeal or the response thereto expressly brought that issue before the Court of Appeals.

B. It failed to notify the parties that it was going to take up this unappealed issue so that arguments could be properly briefed and the inadequacies of the Record could be brought to its attention.

C. There was no oral argument on the issue of laches, and the Court of Appeals did not call for any oral or written argument on the question before deciding it.

D. The Court of Appeals based its sua sponte denial of laches on its own generated statement of facts which had *not* been presented to it by the parties (at least not on the record) and which was grossly in error, prejudicial to the petitioners. Although repeatedly requested in papers before that Court, the Seventh Circuit has never corrected or explained the origins of those misstatements, wherein it said:

> "Prior to 1971, Ever-Ready did not market the products involved in this case under its own name * * * In 1971, Ever-Ready began marketing the products involved in this case. Carbide filed its complaint on December 30, 1971. The time lapse is insufficient to establish laches on the facts of this case." 531 F.2d 366 at 388-389, (1976) (A. 66).
>
> "In any event, the issue of laches was not urged on this appeal and may be considered as having been waived." 531 F.2d 366 at 389, (1976) (A. 66)

The trial Record is replete with exhibits and considerable unchallenged testimony showing petitioners' use of Every-Ready on their products since 1944, in clear contradition of the Seventh Circuit's statements of fact on the laches issue, origins still unknown. (Record, Appendix pp. 218, 236, 237, 243, DX131; 219; pp. 11, 58, 59 Catalog 156-A, (Exh.DX1); pp. 162, 163, 169 Catalog 155-B, (Exh. DX2) 221: Exh. PX 49, pp. 271, 273, 287; DX55, 226, DX 31, pp. 162, 231, 232, 260; pp. 226, 270; Gilbert Despos.

2/23/72, Exh. Forms 9003-ADV., 9005-ADV., pp. 43, 45 Sep. Cert. 6/20/77).

Strangely, the Seventh Circuit, in contradiction of its own generated finding that defendants had first used Ever-Ready on products in 1971, had earlier in its Opinion stated:

> "In 1969 defendants commenced importing miniature lamp bulbs having the term Ever-Ready stamped on their bases and selling these bulbs in blister packages containing the term Ever-Ready in a four-sided logo and indicating that they are for high-intensity lamps." 531 F.2d 366 at 371 (1976) (A. 32).

E. On petition for rehearing, when petitioners had pointed out error in the Seventh Circuit's own generated statement of fact, and plaintiff had filed a responding brief claiming the criticism to be incorrect, the Court of Appeals did not give petitioners a chance to respond to this assertion of incorrectness, but as to laches denied forthwith the petition for rehearing. Respondent, on page 3 of its Reply To Defendants' motion To Reconsider and Vacate Order of April 14, 1977 characterizes the Seventh Circuit's misstatement of facts as mere "inaccuracies".

F. One ground of the plaintiff for resisting rehearing on the question of laches was that even if laches were to be found, an injunction would still be needed to protect the public; but on subsequent trial of the antitrust defense, a former official of plaintiff, serving as plaintiff's witness, and in the course of belittling the importance of EVEREADY from the antitrust standpoint, testified to the effect that no one purchasing a lamp bulb (low voltage being contemplated) relied on trademarks. On common knowledge, the clear fact is that in buying a replacement low voltage bulb the purchaser matches the type of bulb

he has to replace, and takes whatever line the dealer happens to carry. (Reply brief p. 33 Rec. Sep. Certf. 6/30/77).

G. Although the Court's sua sponte statement of facts asserts that defendant did not start using Ever-Ready on the goods involved in the litigation until the year suit was brought (1971), Amici Charles W. Rummler and Louis Robertson pointed to a particular exhibit in the record which clearly showed that defendants were publicly advertising "Ever-Ready" desk lamps (which are subject to the injunction) in 1968. (A. 104).

Of due process, 16 Am Jur 2d Section 583 comments:

> "Generally speaking, due process is satisfied by one hearing which furnishes a full and fair opportunity within the rules. * * * A hearing before judgment, with full opportunity to present all the evidence and the arguments which the party deems important, is all that can be adjudged vital under the guaranty of due process of law. * * * One hearing before judgment, if ample, satisfies the demand of the Federal Constitution in this respect." 11 Louisville & N.R. Co. v. Higson, 234 U.S. 592, 58 L ed 1484, 34 S. Ct. 948; United States v. Heinze, 218 U.S. 532 54 L ed 1139, 31 S. Ct. 98; James v. Appel, 192 U.S. 129, 48 L ed 377, 24 S. Ct. 222; et al.

Petitioners have never enjoyed that "hearing before judgment, with full opportunity to present all the evidence and the arguments which the party deems important" as required by due process.

In *Stolberg* v. *Caldwell,* 423 F. Supp. 1295 (1976) at 1299, it is pointed out that "(t)he Supreme Court has established the framework for analyzing a due process claim such as is presented here. The initial determination is whether the plaintiff has been deprived of 'interests en-

compassed by the Fourteenth Amendment's protection of liberty and property.' Board of Regents v. Roth, 408 U.S. 564, 569, 92 S.Ct. 2701, 2705, 33 L.Ed. 548 (1972). If such a deprivation has occurred, the remaining question is 'the nature of the process that is due.' Morrissey v. Brewer, 408 U.S. 471, 484, 92 S.Ct. 2593, 2602, 33 L. Ed.2d 484 (1972)".

The deprivation of due process in this series of litigation has been denial of a fair and full trial, or denied trial, even a fair and full consideration by the Seventh Circuit of the affirmative defense of laches.

The nature of the process that is due is a judicious examination of the affirmative defense of laches.

As petitioners pointed out in their Reply Brief at page 14 in No.'s 77-1378 and 77-2035, the Court of Appeals had no jurisdiction to rule on laches in No. 75-1371 when that affirmative defense had not been reached by the trier of fact.

28 U.S.C. 2106 only gives a court of appeals power to "modify • • • or reverse any judgment, decree or order of a court lawfully brought before it for review", and there was nothing that lawfully brought before the Court of Appeals in this cause the issue of the affirmative defense of laches.

Once the Court of Appeals had proceeded as far as reversing the determinations of the court below on invalidity and infringement, the affirmative defenses which the trial court had held in abeyance ceased to be moot (as the Seventh Circuit itself recognized, when on denial of the Petition for Rehearing, it amended its Opinion to remand the affirmative defense of misuse of mark in violation of antitrust law), and there was no longer a "final decision"

by which the Court of Appeals could retain jurisdiction under 28 U.S.C. 1291. What remained was no more than "interlocutory" and could only reach the Court of Appeals for review when made final for 28 U.S.C. 1291 to apply again or when certified to that Court under U.S.C. 1292. Neither occurred.

In reaching its decision to deny availability of laches to petitioners, the Seventh Circuit accepted as established fact certain allegations made by Union Carbide, on the Court's invitation to respond to Part II of the petition for rehearing, without affording petitioners the opportunity to respond to those allegations. This procedure is contrary to the basic notions of fair play which the due process clause of the Fifth Amendment guarantees. The adversary system can not be expected to result in the even handed administration of justice if one party is denied the opportunity to be heard, and to present the facts most favorable to their position. The arbitrary and capricious manner in which the Seventh Circuit ruled that the defense of laches had been waived prevented the petitioners from presenting any of the facts on their behalf.

Such glaring violation of petitioners' rights is fundamental to this cause and taints any proceedings which took place subsequent to such violation.

Daniel Webster, in a proceeding before this honorable court, said: "The law should proceed upon inquiry, and only render judgment after *hearing all the facts*". That statement is just as appropriate today as it was in the early 19th century. Regrettably, in this instant case, this basic principle has not been observed.

In its sua sponte decision denying laches against the facts in the record and the law dealing with such pro-

cedure, the U.S. Court of Appeals for the Seventh Circuit has "so far departed from the accepted and usual course of judicial proceedings * * * as to call for an exercise of this Court's power of supervision." Supreme Court Rule 19.1(b).

III.

THE INJUNCTION AS MODIFIED BY THE SEVENTH CIRCUIT WAS EXCESSIVE, PARTICULARLY IN NOT ALLOWING A PERIOD FOR ORDERLY TRANSITION EVEN THOUGH PETITIONERS HAD NOT BEEN CHARGED WITH BAD FAITH AND HAD WON A COMPLETE VICTORY IN THE DISTRICT COURT. THE INJUNCTION WAS ALSO EXCESSIVE IN PROHIBITING USE OF EVER-READY ON DESK LAMPS AND ON BULBS FOR DESK LAMPS, IN VIEW OF THEIR LONG STANDING USEAGE AND THAT THEY WERE OUTSIDE OF UNION CARBIDE'S U.S. PATENT OFFICE TRADEMARK REGISTRATION CERTIFICATES AS WELL AS ITS COMPLAINT BASED ON THOSE CERTIFICATES.

IV.

THE PRACTICE OF THE SEVENTH CIRCUIT COURT OF APPEALS AS INDICATED BY THE FOREGOING LACK OF DUE PROCESS MUST BE DECLARED IMPROPER AS PROTECTION TO ALL LITIGANTS SIMILARLY SITUATED AND AS A MATTER OF PUBLIC IMPORTANCE.

Petitioners, pursuant to their request for extension of time in which to file this petition and as granted, had anticipated that they would secure the services of professional counsel to present this petition. For this reason, and while still strenuously seeking counsel, petitioners had not prepared this petition.

This left petitioners with inadequate time to prepare and present all of their arguments, particularly as to III. and IV., above.

As to those arguments, petitioners stand on these brief statements above.

As to the affirmative defense of laches, we submit that there has been no valid adjudication and for all of the reasons and law presented above, the Order in 77-1378 and 77-2035 should be vacated and petitioners should have their right to initial adjudication of this issue by the District Court restored.

CONCLUSION

The facts and the law have been amply detailed above. If this Court agrees with their validity, a writ should issue to review or vacate the judgment of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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